

PUBLIC FINANCE BERHAD

v.

AIK SOON AUTO SDN. BHD. & 4 ORS.

HIGH COURT, KUALA LUMPUR
 DATO' SITI NORMA YAAKOB J.
 [CIVIL SUIT NO. D2-22-1362-91]
 22 NOVEMBER 1993

PRACTICE & PROCEDURE: Appeal against grant of summary judgment - Claim based on master agreement granting block discounting facilities - Whether master agreement illegal - Whether s. 20 of Finance Companies Act 1969 applicable - Second and third defendants sued under guarantee agreement - Whether absence of assignments in master agreements had prejudiced second and third defendants - Guarantee agreement not providing for rate of interest - Whether interest charged was excessive - Whether there was a defence on the merits.

The plaintiff extended block discounting facilities to the first defendant by way of a master agreement dated 2 July 1980. Under the agreement the first defendant was under an obligation to collect all sums due and payable under hire purchase agreements entered into by the first defendant and remit the same to the plaintiff. The first defendant failed to remit the payments and were sued together with the second and third defendants in their capacity as guarantors.

The suit was subsequently withdrawn, with liberty to file afresh, after a settlement agreement was entered into. On the first defendant's failure to fulfill their obligations under the settlement agreement, the plaintiff filed the present suit against all the defendants.

The defendants contended that the master agreement was illegal as it contravenes s. 20 of the Finance Companies Act 1969 (the Act) and further stated that the absence of the assignments which were envisaged by clause 7 of the master agreement had prejudiced the second and third defendants. The defendants further objected to the rate of interest charged by the plaintiff under the master agreement and to the allowance of costs on a solicitor and client basis.

Held:

[1] From the pleadings there is no uncertainty what the real cause of action is as against the first defendant. By virtue of the master

a agreement and the existence of the earlier suit, there is no basis for the first defendant's objection that the cause of action against them is uncertain.

[2] Section 20 of the Act speaks of unsecured loans but the transactions in these proceedings do not relate to unsecured loans but are in fact block discounting transactions. This has been clearly spelt out in clause 3 of the master agreement and to that end, s. 20 of the Act has no relevance to the nature of the transactions entered into by the plaintiff and the first defendant.

c [3] The absence of the assignments does not affect the liability of the second and third defendants in any way. By virtue of clause 3 of the guarantee agreement even if the assignments had been executed, their liability under the guarantee will not be exonerated.

d [4] The master agreement provided for interest to be charged at between 6.5% - 6.76% per annum. As the plaintiff had failed to show that they had the authority to vary the rate of interest, the plaintiff's claim for interest at 18% per annum is clearly excessive. The rate of interest should follow the contractual rate.

e [5] There was no agreement for payment of costs on a solicitor and client basis and in the circumstances the defendants' objection to the allowance of such costs was allowed.

f [Defendants' appeal dismissed with costs. Judgment ordered to be entered against the defendants for the sum of RM1,088,095.15 with interest at the rate of 6.25% per annum on the sum of RM769,877.74 from 30 July 1993 to date of realisation].

Legislation referred to:

g Finance Companies Act 1969, s. 20

For the plaintiff - Rita Phuah; M/s. Soo Thien Ming & Shahrizat

For the 1st, 2nd & 3rd defendants - Leow Shin Fong (Steven Wong with him); M/s. Arifin & Partners

JUDGMENT**Siti Norma Yaakob J:**

By a master agreement dated 2 July 1980, the plaintiff, a finance company, extended block discounting facilities to the 1st defendant by purchasing the 1st defendant's contractual rights in various hire purchase agreements which the

1st defendant had with various hirers. Under the agreement, the 1st defendant agreed to collect all sums due and payable by the hirers under the hire purchase agreements and to remit the same to the plaintiff and in default the 1st defendant would be charged interest at the rate of 1.5% per month on such overdue payments.

The 2nd and 3rd defendants are sued as guarantors pursuant to a letter of guarantee dated 2 July 1980.

By reason of the 1st defendant's default to remit the monthly instalments collected by them from the hirers, the plaintiff sued all the defendants in Kuala Lumpur Civil Suit No. D1-22-1625-89. This suit was withdrawn with liberty to file afresh when the plaintiff agreed to the defendants' request for time to settle the amount then due subject to the terms and conditions of the instalment payments to be made by the 1st defendant and contained in the plaintiff's letter dated 17 October 1989.

The 1st defendant, however, failed to fulfill their obligations under the settlement agreement and when the plaintiff's demand for all sums due was not met, the present suit was filed against all the defendants on 14 October 1991.

In the instant proceedings to have an O. 14 judgment set aside, the 1st defendant maintain that the statement of claim is not clear under which clause of the master agreement the plaintiff relies to found a cause of action against them.

The first sentence of clause 3 of the agreement clearly sets out the basis of the block discounting transactions which the 1st defendant had entered into with the plaintiff. The third sentence of the same clause clearly provides that the plaintiff can, on demand, cause the 1st defendant to repay all sums they had received on behalf of the plaintiff by reason of the purchase of the 1st defendant's contractual rights. The fact that the 1st defendant are indebted to the plaintiff cannot be denied by reason of the earlier suit and the agreement to pay all sums due by instalment payments.

From the pleadings, there is no uncertainty what the real cause of action is as against the 1st defendant and if indeed the 1st defendant had strong reservations that there is no cause of action against them, they could have easily entered conditional appearance and apply to

a strike out the writ and statement of claim. This they have not done and by virtue of the master agreement, and the existence of the earlier suit, I consider that there is no basis for the 1st defendant's objection that the cause of action against them is uncertain.

b The defendants have also suggested that the master agreement is illegal as it contravenes s. 20 of the Finance Companies Act 1969, which provides that no licensed finance company can grant an unsecured loan of more than RM5,000 to any person other than a licensed finance company, a bank or a financial institution approved by the Central Bank. It is also the

c defendants' contention that as the guarantee furnished by the 2nd and 3rd defendants has been excluded by the Act, then the only security that could have been provided would be the assignments as envisaged by clause 7 of the master agreement which, in this case, were never executed. Additionally, the absence of the assignments has also prejudiced the 2nd and 3rd defendants.

d Section 20 of the 1969 Act speaks of unsecured loans but the transactions in these proceedings do not relate to unsecured loans but are in fact block discounting transactions. This has been clearly spelt out in clause 3 of the master agreement and to that end, s. 20 has no relevance to the nature of the transactions entered by the plaintiff with the 1st defendant.

e As for the absence of the assignments, such an absence does not affect the liability of the 2nd and 3rd defendants in any way, as under clause 3 of the guarantee, their obligations as guarantors shall not be impaired by reason of any assignment created under the master agreement. Thus even if the assignments had been executed, their liability under the guarantee will not be exonerated.

f There was also an objection on the rate of interest to be charged by the plaintiff under the master agreement which has been agreed at between 6.5% - 6.76% per annum. No rate has been specified under the guarantee. The plaintiff has now claimed 1.5% per month or 18% per annum which clearly is excessive. As the plaintiff were not able to satisfy me that they had the authority to vary the rate of interest, I had allowed the defendants' objection and ruled that the rate of interest should follow the contractual rate.

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Likewise, I also allowed the defendants' objection that costs should not be paid on a solicitor and client basis as there is no agreement to that effect although there is an obligation to indemnify the plaintiff for all costs incurred under clauses 3 and 4 of the master agreement.

In dismissing the defendants' appeal with costs, I had ordered that judgment be entered against the defendants for the sum of RM1,088,095.15 with interest at the rate of 6.25% per annum on the sum of RM769,877.74 from 30 July 1993, to date of realisation and costs.

PUBLIC FINANCE BERHAD

v.

**LEE BEE RUBBER FACTORY SDN.
BHD. & 2 ORS.**

HIGH COURT, PENANG

TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[CIVIL SUIT NO. 23-111-84]
9 DECEMBER 1993

CONTRACT: Plaintiff obtaining judgment in default on a guarantee agreement - Defendants applying to set aside judgment in default - Application made more than two years after entry of judgment - Whether there were reasons for the delay - Whether judgment was regularly obtained - Whether defendants entitled to set aside judgment - Whether there was a defence on the merits.

The plaintiff and the first defendant entered into an equipment lease agreement whereby in return for the grant of leasing facilities, the first defendant was to make monthly rent installments to the plaintiff. The second and third defendants were the guarantors for the due performance of the first defendant of all its obligations under the equipment lease agreement. On the first defendant's default in making repayments, the plaintiff commenced action against the second and third defendants for the outstanding balance. The plaintiffs obtained judgment in default against the defendants and the defendants applied to set aside the judgment in default.

The defendants contended that the judgment was irregular as the interest allowed on the judgment was in excess of that permitted by the pre-amended O. 42 r. 12 of the Rules of the High Court 1980 (RHC 1980). The defendants also claimed to have a defence on the merits and raised the plea of *non est factum*. The third defendant further claimed that she had been unduly influenced into signing the guarantee agreement by her husband, the second defendant.

Held:

[1] It is permissible to enter judgment with interest on the judgment debt exceeding the statutory rate of 8% per annum if there was an independent covenant as to the rate of interest, in which event, the doctrine of merger would be inapplicable.

[2] In the present case the claim for interest was based upon Article 19 of the Equipment